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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JOSEPH LEE BROWN,

9 Plaintiff,

10 v.

11 COWLITZ COUNTY SUPERIOR COURT,
12 *et al.*,

13 Defendants.

No. C09-5656 FDB/KLS

ORDER TO AMEND OR SHOW CAUSE

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15 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28
16 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in*
17 *forma pauperis*. On October 19, 2009, Plaintiff filed his proposed civil rights complaint. Dkt. 1.
18 On November 3, 2009, Plaintiff filed his proposed amended complaint. Dkt. 8. Upon review of
19 Plaintiff's proposed amended complaint, the Court finds and orders as follows:

20 **I. DISCUSSION**

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22 Under the Prison Litigation Reform Act of 1995, the Court is required to screen
23 complaints brought by prisoners seeking relief against a governmental entity or officer or
24 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint
25 or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that
26 fail to state a claim upon which relief may be granted, or that seek monetary relief from a

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1 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See
2 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

3 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
4 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
5 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
6 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
7 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
8 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
9 to relief above the speculative level, on the assumption that all the allegations in the complaint
10 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)(citations omitted).
11 In other words, failure to present enough facts to state a claim for relief that is plausible on the
12 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

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14 The court must construe the pleading in the light most favorable to plaintiff and resolve
15 all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Although
16 complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law,
17 unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the
18 court can liberally construe plaintiff’s complaint, it cannot supply an essential fact an inmate has
19 failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673
20 F.2d 266, 268 (9th Cir. 1982)).

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22 Unless it is absolutely clear that amendment would be futile, however, a pro se litigant
23 must be given the opportunity to amend his complaint to correct any deficiencies. *Noll v.*
24 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).
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1 On the basis of these standards, Mr. Brown has failed to state a claim upon which relief
2 can be granted. Mr. Brown purports to sue, among others, the Cowlitz County Superior Court,
3 Cowlitz County Prosecutors' Office, the Longview Police Department, an individual police
4 officer, and a state district attorney, claiming that while he was in jail awaiting trial on other
5 charges, he was unlawfully charged with additional crimes on October 5, 2009. Dkt. 8, p. 3. Mr.
6 Brown states that his due process rights were violated when his date for arraignment on the latter
7 charges was set and that he has received no ruling on a pending motion to dismiss. *Id.* Mr.
8 Brown requests compensation of \$5,000.00 per day for unlawful incarceration, attorney's fees
9 and for pain, suffering, and mental anguish. *Id.*, p. 4.

11 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the
12 defendant must be a person acting under color of state law, (2) and his conduct must have
13 deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of
14 the United States. *Paratt v. Taylor*, 451 U.S. 527, 535 (1981).

16 This action challenges the propriety of ongoing proceedings in Cowlitz County Superior
17 Court. Generally, federal courts will not intervene in a pending criminal proceeding absent
18 extraordinary circumstances where the danger of irreparable harm is both great and immediate.
19 See *Younger v. Harris*, 401 U.S. 37, 45-46 (1971); see also *Fort Belknap Indian Community v.*
20 *Mazurek*, 43 F.3d 428, 431 (9th Cir.1994), cert. denied, 116 S.Ct. 49 (1995) (abstention
21 appropriate if ongoing state judicial proceedings implicate important state interests and offer
22 adequate opportunity to litigate federal constitutional issues); *World Famous Drinking*
23 *Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987)(Younger abstention doctrine
24 applies when the following three conditions exist: (1) ongoing state judicial proceeding; (2)
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1 implication of an important state interest in the proceeding; and (3) an adequate opportunity to
2 raise federal questions in the proceedings).

3 Only in the most unusual circumstances is a petitioner entitled to have the federal court
4 intervene by way of injunction or habeas corpus until after the jury comes in, judgment has been
5 appealed from and the case concluded in the state courts. *Drury v. Cox*, 457 F.2d 764, 764 65
6 (9th Cir.1972). See *Carden v. Montana*, 626 F.2d 82, 83 84 (9th Cir.), cert. denied, 449 U.S.
7 1014 (1980). Extraordinary circumstances exist where irreparable injury is both great and
8 immediate, for example where the state law is flagrantly and patently violative of express
9 constitutional prohibitions or where there is a showing of bad faith, harassment, or other unusual
10 circumstances that would call for equitable relief. *Younger*, 401 U.S. at 46, 53-54.

12 Here, the Plaintiff has not plead any extraordinary circumstances warranting intervention
13 by this Court in any ongoing state proceeding. He has also not plead any violation of rights
14 protected by the Constitution or federal statute. If Plaintiff wishes to proceed with a claim, he
15 must provide a short and plain statement indicating how he has suffered a violation of rights
16 protected by the Constitution or federal statute. He must further describe how such violation was
17 proximately caused by a person acting under color of state or federal law.

19 In addition, when a person confined by government is challenging the very fact or
20 duration of his physical imprisonment, and the relief he seeks will determine that he is or was
21 entitled to immediate release or a speedier release from that imprisonment, his sole federal
22 remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to
23 recover damages for an alleged unconstitutional conviction or imprisonment, or for other harm
24 caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983
25 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged
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1 by executive order, declared invalid by a state tribunal authorized to make such determination, or
2 called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.
3 *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

4 In this case, Mr. Banks requests payment of \$5,000.00 per day for his unlawful
5 incarceration. Dkt. 8, p. 4. As noted above, however, before a prisoner may sue to recover
6 damages for an alleged unconstitutional conviction or imprisonment, or for other harm caused by
7 actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff
8 must prove that the conviction or sentence has been reversed on direct appeal, expunged by
9 executive order, declared invalid by a state tribunal authorized to make such determination, or
10 called into question by a federal court's issuance of a writ of habeas corpus.

12 Plaintiff is also advised that under 42 U.S.C. § 1983, claims can only be brought against
13 people who personally participated in causing the alleged deprivation of a constitutional right.
14 *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). Neither a State nor its officials acting in
15 their official capacities are "persons" under section 1983. *Will v. Michigan Dept. of State Police*,
16 491 U.S. 58, 71 (1989). Thus, the "Cowlitz County Superior Court," "Cowlitz County
17 Prosecutors Office," Cowlitz County Sheriff's Office," "Longview Police Department" are not
18 "persons" under section 1983.

20 Plaintiff also names Officer Meadows, Kayla Clifton and Rachel Anderson, but fails to
21 allege facts to support any claim of constitutional harm under 42 U.S.C. § 1983. Plaintiff must
22 set forth facts describing when and where and by whom he was deprived of a constitutional right.
23 Plaintiff's Complaint must include factual allegations describing how each individual caused or
24 personally participated in causing him the harm that he claims he suffered. In addition, Plaintiff
25 must name the individuals who are responsible for causing him harm. It is not sufficient to
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1 merely name individuals in supervisory positions. He must name the individual defendants who
2 violated his federal rights and he must allege facts showing how individually named defendants
3 caused or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*,
4 637 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983
5 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of*
6 *Social Services*, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not sufficient
7 to state a § 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

9 Plaintiff also purports to sue Sue Barr, D.A. However, a state prosecuting attorney who
10 acts within the scope of his or her duties in initiating and pursuing a criminal prosecution and
11 presenting the State's case is absolutely immune from a suit brought for damages under 42
12 U.S.C. § 1983, *Imbler v. Pachtman*, 424 U.S. 409, 424, 427 (1976); *Ashelman v. Pope*, 793 F.2d
13 1072, 1076, 1078 (9th Cir. 1986) (en banc), "insofar as that conduct is 'intimately associated
14 with the judicial phase of the criminal process,'" *Burns v. Reed*, 500 U.S. 478, 486
15 (1991)(quoting *Imbler*, 424 U.S. at 431). This is so even though the prosecutor has violated a
16 plaintiff's constitutional rights, *Broam v. Bogan*, 320 F.3d 1023, 1028-29 (9th Cir. 2003), or the
17 prosecutor acts with malicious intent, *Genzler v. Longanbach*, 410 F.3d 630, 637 (9th Cir.), cert.
18 denied, 546 U.S. 1031, 126 S.Ct. 736, 546 U.S. 1031, 126 S.Ct. 737, 546 U.S. 1032, 126 S.Ct.
19 749 (2005); *Ashelman*, 793 F.2d at 1078.

21 Due to the deficiencies described above, the Court will not serve the complaint. Mr.
22 Brown may file an amended complaint curing, if possible, the above noted deficiencies, or show
23 cause explaining why this matter should not be dismissed no later than **December 18, 2009**. If
24 Mr. Brown chooses to file an amended complaint, which seeks relief cognizable under 42 U.S.C.
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§ 1983, his amended complaint shall consist of a short and plain statement showing that he is entitled to relief, and he must allege with specificity the following:

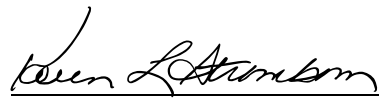
- 1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights;
- 2) the dates on which the conduct of each defendant allegedly took place; and
- 3) the specific conduct or action Plaintiff alleges is unconstitutional.

Mr. Brown shall set forth his factual allegations in separately numbered paragraphs. The amended complaint shall operate as a complete substitute for (rather than a mere supplement to) the present complaint. Mr. Brown shall present his complaint on the form provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part of the original complaint by reference, and it must be clearly labeled the “First Amended Complaint” and Cause Number C09-5656FDB/KLS must be written in the caption. Additionally, Plaintiff must submit a copy of the “First Amended Complaint” for service on each named Defendant.

If Mr. Brown decides to file an amended civil rights complaint in this action, he is cautioned that if the amended complaint is not timely filed or if he fails to adequately address the issues raised herein on or before **December 18, 2009**, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three or more civil actions or appeals which are dismissed on grounds they are legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

1 The Clerk is directed to send Mr. Brown the appropriate form for filing a 42 U.S.C.
2 1983 civil rights complaint. The Clerk is further directed to send a copy of this Order and
3 a copy of the General Order to Plaintiff.
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5 DATED this 23rd day of November, 2009.
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9 Karen L. Strombom
10 United States Magistrate Judge
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